(2)

Office-Supreme Court, U.S.
FILED
MAR 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1273

In The
Supreme Court of the United States
October Term, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,
v.
SCOTT E. EWING,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL M. CONWAY*
MARY K. BUTLER
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

Attorneys for Respondent
Scott E. Ewing

*Counsel of Record

February 28, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

35 pp

QUESTIONS PRESENTED

1. Does the petition raise any substantial Eleventh Amendment issue regarding the grant of prospective injunctive relief against Regents for violation of federal law, where the complaint characterized the defendant only as the Board of Regents of the University of Michigan, but Regents represented to the District Court that the Eleventh Amendment was no bar to injunctive relief (citing authorities in which injunctions were entered against officials in their official capacities), the case was tried on the merits on that basis, and pleading defects, if any, in not naming the individual Regents in their official capacities can be remedied by amendment pursuant to F.R.C.P. 15 (b) and *Brandon v. Holt*?

2. Is Regents' assertion of the Eleventh Amendment in their petition barred by waiver, since Regents explicitly represented to the District Court that the Eleventh Amendment was inoperative as to injunctive relief, the issue was not raised in the appeal on the merits, and the rehearing petition in the court of appeals raised the issue only on the grounds that the injunction granted retroactive relief, an issue not pursued in the petition?

3. Did the Court of Appeals correctly apply the stringent arbitrary and capricious standard for determining a violation of substantive due process rights by Regents, when such standard has been consistently applied by other courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT:	
I. THIS CASE RAISES NO NOVEL OR CONTROVERSIAL QUESTION OF LAW REGARDING THE ELEVENTH AMENDMENT.	7
A. *Pennhurst* is inapplicable	7
B. The only issue in this case is a semantic one	9
II. IF A PLEADING DEFECT EXISTS, EWING MAY SIMPLY AMEND HIS COMPLAINT TO CONFORM TO THE EVIDENCE UNDER *BRANDON v. HOLT*	13
III. EVEN IF REGENTS WERE ENTITLED TO SOME FORM OF IMMUNITY, THEY HAVE WAIVED THAT IMMUNITY	16
IV. BECAUSE THERE IS NO DISAGREEMENT AMONG THE LOWER COURTS ON WHETHER AN ARBITRARY AND CAPRICIOUS STUDENT DISMISSAL IS POTENTIALLY ACTIONABLE, NOR ANY DECISION BY THIS COURT TO SUGGEST OTHERWISE, THIS FACT-BOUND CASE IS UNWORTHY OF SUPREME COURT REVIEW	18
CONCLUSION	28

TABLE OF AUTHORITIES

	Page
CASES	
Arthur v. Nyquist, 573 F.2d 134 (2d Cir.) *cert. denied*, 439 U.S. 860 (1978)	15
Barnes v. Cohen, 749 F.2d 1009 (3d Cir. 1984)	8
Board of Curators v. Horowitz, 435 U.S. 78 (1978)	19, 20, 21
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	8
Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909)	22
Brandon v. Holt, 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985)	8, 9, 13, 14, 15
Connelly v. University of Vermont and State Agr. Col., 244 F. Supp. 156 (D. Vt. 1965)	24
Crook v. Baker, 584 F. Supp. 1531 (E.D. Mich. 1984)	20, 21
Edelman v. Jordan, 415 U.S. 651 (1973)	10, 12
Ex Parte Young, 209 U.S. 123 (1908)	9, 12, 14
Gasper v. Burton, 513 F.2d 843 (10th Cir. 1975)	24
Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974)	15
Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975)	22
Hines v. Rinker, 667 F.2d 699 (8th Cir. 1981)	19
Hubbard v. John Tyler Community College, 455 F. Supp. 753 (E.D. Va. 1978)	19, 20
Hutto v. Finney, 437 U.S. 678 (1978)	8, 12
Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982)	12, 15

TABLE OF AUTHORITIES—Continued

	Page
Jago v. Van Curen, 454 U.S. 14 (1981)	8
Lavash v. Kountze, 473 F. Supp. 868 (D. Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979)	19, 20
Nuttelman v. Case Western Reserve University, 560 F. Supp. 1 (N.D. Ohio 1981), *aff'd* 708 F.2d 726 (6th Cir. 1982)	19
Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982)	15
Pennhurst State School and Hospital v. Halderman, — U.S. —, 104 S.Ct. 900 (1984)	7, 8
Perry v. Sindermann, 408 U.S. 593 (1972)	8
Stevens v. Hunt, 646 F.2d 1168 (6th Cir. 1981)	20
Stoller v. College of Medicine, 562 F. Supp. 403 (M.D. Pa. 1983) *aff'd*, 727 F.2d 1101 (3d Cir. 1984)	19
Students of California School For the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984)	8
Tayyari v. New Mexico State University, 495 F. Supp. 1365 (D. N.M. 1980)	10
Toll v. Moreno, 458 U.S. 1 (1982)	16, 18
Weisbord v. Michigan State University, 495 F. Supp. 1347 (W.D. Mich. 1980)	10, 13
Wood v. Strickland, 420 U.S. 308 (1975)	23

CONSTITUTION, STATUTES

U.S. Const. Amend. XI	passim
42 U.S.C. § 1983	8, 9, 10, 13, 14, 15, 17, 23
Michigan Const., 1963, Article 8 § 5	10
MCL 390.4	10

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Irby, Fantel, Milam and Schwarz, *Special Report: Legal Guidelines for Evaluating and Dismissing Medical Students*, 304 NEW ENGLAND JOURNAL OF MEDICINE 180 (1981) 24

COUNTERSTATEMENT OF THE CASE[1]

A. *The Medical School's Inteflex Program.*

Respondent Scott E. Ewing ("Ewing") enrolled in 1975 in a six-year program of study offered jointly by the University of Michigan's medical school and undergraduate college known as the Inteflex Program. Inteflex students earn both the baccalaureate and the M.D. degrees. (Tr. II at 113; Tr. I at 25-26). The Inteflex Program accepts annually 50 students after high school and exposes them to a combined curriculum of undergraduate and medical courses, including a medical clerkship, without requiring the students to reapply to medical school after completing their undergraduate studies. (Tr. I at 26-27).

In addition to the medical students in the Inteflex Program, the University of Michigan Medical School also

---

[1]Ewing has filed a counterstatement of the case since the "Statement of Relevant Facts," by the Regents of the University of Michigan ("Regents") (Petition at 3-9) contains a number of assertions unsupported by the record. For example, Regents state that "[Ewing] further admitted that he had been fully . . . aware when he took the NBME . . . that if he failed he could be dropped from registration." (Petition at 8). Cited in support are a reference (Tr. III at 273) to the testimony of Dr. Friedman, a faculty member, and the minutes of the Promotion and Review Board's July 31, 1981, meeting (DX 10), at which Ewing allegedly made this admission. What is not disclosed, however, is that on recross-examination Dr. Friedman disavowed his earlier testimony and conceded that Ewing had neither said nor even implied that he had been aware a single failure of the NBME Part I could lead to his dismissal. (Tr. III at 295). Dr. Friedman's corrected testimony comports with Ewing's own testimony on the inaccuracy of the comments attributed to him in DX 10. (Tr. III at 63-64). Indeed, Ewing contested the accuracy of these minutes as soon as he obtained a copy of them in August 1981. (DX 22). Equally important, Ewing challenged on appeal the admissibility of DX 10 under the Federal Rules of Evidence (Brief at 39-41; Reply Brief at 27-30), but the Court of Appeals did not reach the issue.

admits students who have already earned their undergraduate degrees into a four-year, traditional medical school program (hereinafter "Standard Program"). (Tr. I at 27). Both Inteflex and Standard students earn the same medical degree. (Tr. I at 27).

The Inteflex Program is divided into three two-year phases. (Tr. I at 146; PX 2 at 12-14). Phase I, the first two years, consists predominately of premedical courses, with some medical courses during the last semester. (Tr. I at 146; Tr. II at 115). Ewing successfully completed Phase I in the prescribed two years of registration. (Tr. II at 115-17).

Phase II of the Inteflex Program entails study predominately in the basic medical sciences. (Tr. I at 146). Students in the Standard Program in their first two years take medical courses covering the same general subject matter as Inteflex students take during Phase II. (Tr. I at 122-26). Ewing successfully passed all of these required courses in Phase II of the Inteflex Program. (Tr. II at 119-20; PX 6). Accordingly, at the time of taking the NBME Part I in June 1981, Ewing had fulfilled every course requirement for the Phase II segment of the Inteflex Program. (Tr. II at 120; Tr. I at 178).

Phase III of the Inteflex Program, which corresponds to the third and fourth years of the Medical School's Standard Program, consists of clinical training at the University's affiliated hospitals. Inteflex and Standard students are combined at this point and receive virtually identical training during the clinical phase. (Tr. I at 27-28, 147). Immediately prior to these final two years of the program, both Inteflex and Standard students take

a standardized test known as the NBME Part I. (Tr. I at 28, 147-48).

The National Board of Medical Examiners administers the NBME Part I examination (PX 4), which consists of approximately 1,000 multiple-choice questions covering the biomedical sciences. (Tr. I at 28-30). In setting the passing mark for the NBME Part I, raw scores are converted so that those examinees placing in the bottom 8-12% fail regardless of their raw scores. (Tr. I at 191, 31-32). The National Board permits any student to take the NBME Part I at least three times in an effort to pass. (PX4 at p. 16; Tr. I at 87-88). The sole qualification for taking the NBME Part I is that the student be enrolled in an accredited medical school. (PX 4 at p. 6; Tr. I at 88-89).

Ewing failed the NBME Part I the first and only time he took it.[2] (Tr. II at 133). Ewing was dismissed because of this single failure of the NBME Part I examination. (Tr. I at 157). If Ewing had passed the NBME Part I, he would have been promoted to the clinical phase of his education. (Tr. I at 163; Tr. III at 279).

Ewing has never asked a court to make him a doctor or to pass on his academic qualifications. All Ewing seeks, in accordance with Regents' established policy, is to be allowed to retake the NBME Part I and to have

---

[2]Regents state that Ewing's NBME Part I score was the lowest in the school's history and point to the District Court's finding in support. (Petition at 7). Nonetheless, as was detailed in Ewing's reply brief to the Court of Appeals, no such allegation was ever raised at trial and there is no evidence in the record to support it. (Reply Brief at 14-16).

those test results determine whether he can go on with his medical education. (Tr. III at 12).

B. *The University's Unbroken Policy and Practice of Allowing Retests of the NBME Part I.*

Ewing was the only University of Michigan medical student—in either the Inteflex or Standard Program—ever denied a retest of the NBME Part I. (Tr. I at 60-61, 82-84). Every other student was given a second chance. (Tr. I at 60-61, 82-84, 156). Since 1975, 40 University of Michigan students (both Inteflex and Standard Program) failed the NBME Part I on the first occasion. (PX 1 and 18). Every student other than Ewing was permitted a retest, including an Inteflex student who failed the same session of the test that Ewing failed. (PX 1 and 18; Tr. I at 60-61, 82-84 and 156).

At the time Ewing took the NBME Part I, University of Michigan medical students were routinely given a second opportunity to take the NBME Part I if they failed the first time. (Tr. I at 159). It was a common practice to allow the retest. (Tr. I at 160). In June 1981, a Medical School publication entitled "On Becoming a Doctor" was issued by the University of Michigan (Tr. I at 90-95; 160-62; PX 3) and distributed on the campus of the University approximately a week prior to the date on which Ewing took the NBME Part I.[3] (Tr. I at 163). This

[3]The Court of Appeals found: "This University publication is important because, irrespective of whether Ewing saw this pamphlet before taking the NBME Part I, this pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination." (App. 33a). ("App. —" refers to the appendix to the petition containing the lower courts' decisions).

University publication paraphrased Assistant Dean Ralph M. Gibson of the Medical School and stated in part:

> According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. *Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam.*

(PX 3 at 30 (emphasis added); Tr. I at 95-96; 208).

C. *By the Regents' own Standards, Ewing was a Qualified Student and Therefore Entitled to Retake the NBME Part I.*

Ewing had passed all of his course work (Tr. I at 178) and was a qualified student when he took the NBME Part I (Tr. II at 104-05; Tr. III at 181-83; representation of Regents' counsel, Tr. III at 147).[4]

By Regents' own interpretation of Ewing's record, he had a total of three deficiencies out of 23 medical school courses during his entire period of enrollment. (Tr. I at 168, PX 1 at 7). Each of Ewing's three prior academic deficiencies had been successfully removed by the time he

[4]Dean Robert E. Reed, himself a medical doctor and Director of the Inteflex Program, testified that he knew Ewing and his overall record better than anyone at the Medical School (Tr. I at 214), that Ewing was not unfit to be a doctor because of any problem with his "attitude, personality or moral character," and that Ewing had clearly demonstrated the intellectual ability to be a doctor. (Tr. I at 206). Reed also testified that Ewing had "always" acted "in a manner befitting a medical student and future physician." (Tr. I at 198-99).

sat for the NBME Part I. (Tr. I at 174-75).[5] He had no outstanding deficiencies. (Tr. II at 104; Tr. III at 289). Ewing had passed every course up to that time. (Tr. I at 178; Tr. III at 178-79; PX 6).

Of the 39 medical students permitted by Regents to retake the NBME Part I since 1975, many had more course deficiencies than Ewing, whether measured in absolute numbers or as a percentage of courses taken. (PX 1 and 18). University records, stipulated to be accurate (Tr. I at 142), reflect that of the 39 other students, one student was given four opportunities to pass the NBME Part I, even though he had three deficiencies out of 10 courses. (Tr. I at 60; PX 1 and 18 at p. 1). Ten students were permitted to take the NBME Part I examination three times each. (Tr. I at 60; PX 1 and 18). Another 28 students were given two opportunities to pass the NBME Part I. (Tr. I at 60; PX 1). One Inteflex student who failed the examination in June 1981 when Ewing took it was given three chances to pass, repeating the NBME Part I in September 1981 and June 1982. (PX 1 at p. 7). A total of seven Inteflex students were given two or more tries to pass the examination. (PX 1 at p. 7). One of these Inteflex students had academic deficiencies in nine of 23 courses prior to failing the NBME Part I and another had four deficiencies. (PX 1 at p. 7). Of the Standard students permitted an NBME Part I retest, one had aca-

[5]Regents' assertion (Petition at 6, n. 6) that Ewing's remediated course deficiencies had not been removed is contrary to Regents' own letter to Ewing informing him of "the removal of your . . . deficiency" (PX 9) and the testimony of the faculty that Ewing had no deficiencies when he took the NBME Part I. (Tr. I at 174-75; Tr. II at 104; Tr. III at 289).

demic deficiencies in fully 70% of his courses, seven of 10, and another in 50%. (Tr. I at 47-50. 133; PX 1 and 18). Academic deficiencies by Standard students were considered just as serious as those by Inteflex students. (Tr. I at 155-56). Only Ewing of the 40 Inteflex and Standard students had received both an Honors grade for outstanding academic achievement and had published research during his medical school education. (Tr. I at 57-58, 186-90; JX 1; PX 10; PX 11; PX 17; PX 18).

REASONS FOR DENYING THE WRIT

I. This Case Raises No Novel Or Controversial Question Of Law Regarding The Eleventh Amendment.

Faced with the decision on the merits by the Court of Appeals that they violated Ewing's constitutional rights, Regents now seek to overturn that decision by characterizing the judgment as one which this Court's decision in *Pennhurst State School and Hospital v. Halderman*, — U.S. —, 104 S. Ct. 900 (1984), would invalidate. This contention is without merit.

A. Pennhurst is inapplicable.

This Court's decision in *Pennhurst* has no application to this case. *Pennhurst* involved the power of federal courts to issue judgments requiring state officials to conform their behavior to state law. This Court reversed a federal court injunction enjoining violations of a state law, the Pennsylvania Mental Health and Mental Retardation Act of 1966, by Pennsylvania state officials operating a state school and hospital. The *Pennhurst* decision is premised on considerations of the interpretation of

state law by federal courts, specifically where the federal court imposes its authority over state officials to regulate their conduct in accordance with *state* law. In contrast, this case concerns a violation of *federal* law, 42 U.S.C. § 1983, by state officials. The interpretation of federal law by the United States Court of Appeals for the Sixth Circuit here simply does not raise the same issues of federalism which underlie the *Pennhurst* decision.

Ewing claimed that Regents, under color of state law, deprived him of a property interest which is protected by the Constitution. While property interests are created and defined by state law and include contractual provisions or mutual implied understandings, *Jago v. Van Curen,* 454 U.S. 14, 18 (1981); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972); *Perry v. Sindermann,* 408 U.S. 593, 601-02 (1972), the deprivation of that right is a federal constitutional violation. The Court of Appeals in this case properly held that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections." App. 31a. *Pennhurst* does not preclude injunctive relief against state officials for violation of federal law. *Barnes v. Cohen,* 749 F.2d 1009, 1019 (3d Cir. 1984); *Students of California School For the Blind v. Honig,* 736 F.2d 538, 543 (9th Cir. 1984). Unlike *Pennhurst,* Regents are charged with violating federal law by depriving Ewing of his state-recognized property interest. The inapplicability of *Pennhurst* as a bar to relief is reconfirmed by this Court's recent decision in *Brandon v. Holt,* 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985), which cites with approval *Hutto*

v. Finney, 437 U.S. 678 (1978), for the proposition that prospective injunctive relief against state officials for Section 1983 violations is not barred by the Eleventh Amendment. The Regents' reliance on *Pennhurst* as a justification for their petition is misplaced.

B. The only issue in this case is a semantic one.

Contrary to the Regents' recent attempts to recharacterize it, this case does not present any broad question regarding the limits of the state's immunity from liability for violations of 42 U.S.C. § 1983. *See Brandon v. Holt, supra; Hutto v. Finney, supra; Ex Parte Young,* 209 U.S. 123 (1908). The only issue in this case involving the Eleventh Amendment is essentially a semantic one.

Ewing has not only stated a claim under 42 U.S.C. § 1983, but proved it. In an effort to avoid liability, Regents now argue that Ewing has not really sued Regents individually in their official capacities, and, as a result, the Eleventh Amendment bars relief. Ewing should not be stripped of any injunctive relief awarded him because of a semantic argument by the wrongdoer. In drafting the pleadings in this case, Ewing named as defendant the "Board of Regents of the University of Michigan." Ewing does not contest the fact that under existing law to be entitled to relief the injunction must run against officials of the University, unless the University has waived its immunity as has also occurred here. Ewing contends that, in suing Regents, he has satisfied this legal requirement. Regents have tardily decided—after a full trial and appeal—that Ewing has not.

By suing the Board of Regents, rather than the University or the State of Michigan directly, Ewing has sued the officials responsible for running the University in

their official capacity. The Board of Regents of the University of Michigan is "a body corporate" charged with supervising the University and managing its funds. Michigan Constitution of 1963, Article 8 § 5; MCL 390.4. Furthermore, Regents' conduct in appearing and defending this action has been consistent with the principle that injunctive relief against the named Regents is not barred by the Eleventh Amendment. A detailed review of the facts of this case, including its procedural history, make this apparent.

In the District Court, Regents explicitly acknowledged that the injunctive relief sought by Ewing in Count I, based upon 42 U.S.C. § 1983, and Count II, based upon contract right, was not barred by the immunity defense of the Eleventh Amendment. In opposing Count III for damages in Ewing's complaint, Regents stated that

> [i]n fact, the eleventh amendment bars any damage action against either the University or its officials here. *Weisbord v. Michigan State University,* 495 F. Supp. 1347 (W.D. Mich. 1980). It is only as to prospective injunctive relief (such as that sought in Counts I and II of instant plaintiff's Complaint) that the immunity defense of the eleventh amendment is inoperative. *Edelman v. Jordan,* 415 U.S. 651 (1973); and *Tayyari v. New Mexico State University,* 495 F.Supp. 1365 (D. N.M. 1980) (parenthetical phrase in original).

Regents' "Memorandum Brief in Support of Motion to Dismiss Count III for Failure to State a Claim" filed September 8, 1982.

---

[6]Regents' citation to *Edelman* and *Tayyari* for the proposition that Ewing could obtain injunctive relief despite the Eleventh Amendment reveals the Regents' understanding that, as in *Edelman* and *Tayyari,* injunctive relief was being sought against public officials.

While successfully asserting the Eleventh Amendment as a defense to Count III seeking damages, Regents proceeded to a full non-jury trial on the merits as to the three counts for injunctive relief contained in the Amended Complaint. Regents consistently regarded the Eleventh Amendment to be applicable to the damage claim and not to the claim for injunctive relief. This is demonstrated repeatedly by excerpts from the Regents' "Memorandum Brief in Opposition to Plaintiff's Motion for Entry of Preliminary Injunction" (Oct. 13, 1982). Regents candidly acknowledged,

> Because the defendants have interposed the defense that the eleventh amendment prevents recovery of money damages, *the only relief which plaintiff can obtain if he is successful is equitable.*

Id. at 11 (emphasis added). Later in this same document the Regents further conceded their liability for injunctive relief even if their Eleventh Amendment defense against monetary damages proved successful:

> If defendant University is found to be liable to plaintiff and is also unsuccessful in sustaining its defense of eleventh amendment immunity *from damages,* plaintiff will have adequate remedies at law. . . .
>
> If defendant University is found to be liable even though it is protected by the eleventh amendment, *plaintiff will enjoy the favor of equitable remedies.* . . . The University could then be made to provide him with needed tutorial services to assist him in his review or to assist him in finding employment beyond his normal expectations.

Id. at 30-31 (emphasis added).

Regents made no mention of the Eleventh Amendment in their trial brief (dated January 7, 1983), in their

post-trial brief (dated January 14, 1983), or in their closing argument (January 14, 1983). When the District Court ruled in favor of Regents on those counts, Ewing appealed the entry of judgment on Counts I, II and IV to the Sixth Circuit Court of Appeals. Although Ewing in his initial brief in the Court of Appeals stated his position that *Ex Parte Young,* 209 U.S. 123 (1908), permitted the requested injunctive relief,[7] Regents omitted any reference whatsoever to the Eleventh Amendment in their brief on the merits and at oral argument. In their unsuccessful petition for rehearing, Regents challenged the purported "retroactive" nature of the injunctive relief on Eleventh Amendment grounds, but they did not assert any immunity as to prospective injunctive relief.

The only rational explanation for Regents' position regarding the applicability of the Eleventh Amendment to the damage claim but not to the injunction claims is that, as in *Edelman,* which Regents cited, Regents perceived that a monetary judgment against Regents is barred since the financial loss would be borne by the state, while injunctive relief against Regents would run against the officials and is not barred. This analysis is the only logical way to reconcile Regents' divergent treatment of the damage and injunction counts.

A complaint naming the office or the agency, but not the current agents by individual name, is properly construed as a suit against the officials in their official capacities. *Weisbord v. Michigan State University,* 495 F. Supp. 1347 (W.D. Mich. 1980). In *Weisbord,* the plaintiff seeking relief under 42 U.S.C. § 1983 and other statutes named as defendants various offices of Michigan State University. Acknowledging the policy underlying Section 1983 of not dismissing claims unless it appears no claim for relief can be stated, the court held that it would construe the complaint as one against the officials holding those offices in their official capacities. Specifically, the court stated:

> Plaintiff has technically not named any state officials as defendants, having merely named the offices or titles held by those officials. In view of the liberal pleading requirements of the Federal Rules, *see,* Fed.R.Civ.P. 1, and the standards for dismissing a civil rights action in particular, *Westlake v. Lucas,* 537 F.2d 857 (6th Cir. 1976); *Lucarell v. McNair,* 453 F.2d 836 (6th Cir. 1972), the court will construe the complaint as one against the state officials who constitute the Board of Trustees and the President of Michigan State University in their official capacities. To do otherwise would be to exalt form over substance, and accomplish no more than delay in the lawsuit inasmuch as plaintiff would be free to amend his complaint to name these specific individuals by name if the action was dismissed on this narrow technical ground.

Id. at 1355.

II. If A Pleading Defect Exists, Ewing May Simply Amend His Complaint To Conform To The Evidence Under Brandon v. Holt.

If any pleading defect is perceived, a straightforward application of Rule 15(b) of the Federal Rules of Civil Procedure, as in *Brandon v. Holt,* 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985), permitting amendment

---

[7]Ewing's brief stated: "Furthermore, the eleventh amendment does not preclude injunctive relief against the Board. *Ex Parte Young,* 209 U.S. 123 (1908); *Hutto v. Finney,* 437 U.S. 678, 690 (1978); *Jackson v. Hayakawa,* 682 F.2d 1344, 1350-51 (9th Cir. 1982)." Plaintiff-Appellant's Brief at 16.

of the pleadings to conform to the proof, provides a complete resolution of this issue. There is no reason for review by this Court of such a readily curable pleading matter, if a cure is required at all. Granting the writ on this issue is an unwarranted use of scarce judicial resources.

Since the Regents agreed to go to trial on the merits of this case, apparently seeking to establish the validity of Regents' conduct, Ewing should be permitted to amend his complaint, if any amendment is needed to obviate Eleventh Amendment problems. By amendment Ewing would simply name more specifically the individual Regents as defendants instead of the Board of Regents. If such an amendment were made, there is no question that the Eleventh Amendment is inapplicable. *Ex Parte Young,* 209 U.S. 123 (1908). Such an amendment to cure a pleading defect was recently sanctioned by this Court in an action brought under 42 U.S.C. § 1983. In *Brandon v. Holt* this Court in permitting an amendment to a complaint originally naming the Director of Police of the City of Memphis to add the city as a defendant, stated:

> Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact. Moreover, it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed. . . .

53 U.S.L.W. at 4124 (footnote omitted).

There is no prejudice in allowing an amendment here, since the evidence at trial proved a violation of Section 1983 by the agents of the University in arbitrarily dismissing Ewing. The evidence in this case is all about the conduct of the individual deans and faculty members of the University acting in their official positions;

Regents in their official positions are ultimately responsible for this conduct.

This view that plaintiff should be allowed to substitute, as defendants, the constituent members of a corporate body for that body by amendment has been endorsed by the courts of appeals. In *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir.) *cert. denied,* 439 U.S. 860 (1978), for example, the Second Circuit permitted plaintiffs in a class action civil rights suit to join individual officials in their official capacities as defendants after the trial was concluded. In permitting the amendment, the court noted that Section 1983 actions implicate three different types of entities: (1) corporate bodies; (2) constituent members of corporate bodies in their representative capacities; and (3) constituent members in their individual capacities. The court held that the first two categories, corporate bodies and their members in their official capacities, are for jurisprudential purposes, "interchangeable before, during and after trial." *Id.* at 140. *Cf. Jackson v. Hayakawa,* 682 F.2d 1344 (9th Cir. 1982); *Gay Students Org. of Univ. of New Hampshire v. Bonner,* 509 F.2d 652 (1st Cir. 1974).

Finally, in *Patsy v. Board of Regents,* 457 U.S. 496 (1982), in reinstating a civil rights action dismissed on the pleadings, this Court specifically acknowledged that the district court could "permit amendments to the pleadings that might cure any potential Eleventh Amendment problems." *Id.* at 515-16, n. 19.

Since Regents, in both lower courts, have regarded the injunction claims to be outside the Eleventh Amendment in a suit naming them as defendants, amendment under F.R.C.P. 15 (b) and *Brandon* to name Regents individually in their official capacities would cure any technical deficiency. Because the propriety of this same type of

amendment was decided by the Court this Term, the petition raises no Eleventh Amendment question warranting review. Such a review here would not only leave the result in this case unchanged, it would merely reiterate existing law.

III. Even If Regents Were Entitled To Some Form Of Immunity, They Have Waived That Immunity.

In this litigation, Regents have on many occasions conceded that they are not entitled to immunity against the injunction counts. While the Eleventh Amendment may be raised on appeal, Regents' conduct here constitutes a waiver of any immunity which Regents may have had. *See Toll v. Moreno,* 458 U.S. 1 (1982).

In *Toll v. Moreno,* based on the conduct of the parties in litigation which is strikingly similar to this case, this Court held that a university waived its Eleventh Amendment immunity. In *Toll,* the plaintiff brought an action for declaratory and injunctive relief against the state-operated University of Maryland and its president. The district court entered an injunction directing the university to pay refunds to students who, but for the university's unconstitutional policy, would have paid reduced tuition. In seeking a stay of that order pending appeal, the university represented to the district court that in the event the order appealed from was affirmed, it would make funds available to make refunds in accordance with the judgment. Based on this action by the university, this Court held that it waived any Eleventh Amendment immunity to which it may have been entitled. 458 U.S. at 18.

A detailed review of the facts and the procedural history of this case reveals that Regents have conceded on

numerous occasions that Ewing was entitled to injunctive relief against Regents, if he could show a section 1983 violation.

In a consistent strategy, Regents sought a decision on the merits on Ewing's substantive due process claim in hope of establishing a judicial precedent to insulate even arbitrary and capricious academic conduct from judicial review. The strategy is manifest in a myriad of ways: (1) in seeking dismissal of Count III for monetary damages on Eleventh Amendment grounds but pressing no similar motion to dismiss the injunction counts[8], (2) in filing a memorandum saying the Eleventh Amendment was "inoperative" to Ewing's request for injunctive relief ("Memorandum Brief in Support of Motion to Dismiss Count III for Failure to State a Claim" filed on September 8, 1982; at p. 4); (3) in stating that Ewing would "enjoy the favor of equitable remedies" even if Regents prevailed on their Eleventh Amendment defense and that because of the Eleventh Amendment "the only relief which plaintiff can obtain if he is successful is equitable" ("Memorandum Brief in Opposition to Plaintiff's Motion for Entry of Preliminary Injunction" filed on October 13, 1982; at p. 31, 11); (4) in omitting any reference to the Eleventh Amendment in their trial memorandum (dated January 7, 1983), during the trial itself, including closing argument of counsel to the district judge, and in their post-trial memorandum (dated January 14, 1983); (5) in omitting any

---

[8]In the Answer to the Amended Complaint containing both the damage and injunction counts, Regents pleaded the Eleventh Amendment as an affirmative defense. However, they never referred to it, except in the context of Count III seeking damages, in the District Court or referred to it in the Court of Appeals prior to petitioning for rehearing.

reference whatsoever to the Eleventh Amendment in their original brief and argument to the Sixth Circuit; and (6) in limiting their reference to it in their rehearing petition in the Sixth Circuit to an Eleventh Amendment bar to retroactive injunctive relief. Only in their petition to this Court have Regents pressed an Eleventh Amendment argument which would bar even prospective injunctive relief.

By their explicit representations to the District Court acknowledging the Eleventh Amendment and yet consenting to be sued, Regents have waived any Eleventh Amendment defense they may have. Having waived the defense as to the injunctive counts, under the teaching of *Toll v. Moreno,* 458 U.S. at 18, Regents are barred from resurrecting the defense.

As a policy matter, defendants should not be encouraged to "ambush" successful plaintiffs in this manner. Regents in this case should not be permitted to exploit what they now perceive to be an ambiguity in Ewing's characterization of them.

IV. Because There Is No Disagreement Among The Lower Courts On Whether An Arbitrary And Capricious Student Dismissal Is Potentially Actionable, Nor Any Decision By This Court To Suggest Otherwise, This Fact-Bound Case Is Unworthy Of Supreme Court Review.

The Sixth Circuit's decision below neither conflicts with the decisions of this Court nor those of the other courts of appeals. The Sixth Circuit applied the stringent "arbitrary and capricious" standard to review a substantive due process claim—the test either assumed or actually applied in all of the decisions cited by Regents. The only

difference in his case is factual. Ewing, as an issue of fact, prevailed under this difficult standard. Since no conflict of law is present, issuance of a writ is not warranted.

Regents in their petition essentially question whether a dismissed medical student is entitled to any judicial review of his substantive due process rights at all. Although this Court has not expressly addressed the issue of a dismissed student's substantive due process rights, it has nonetheless acknowledged, in *Board of Curators v. Horowitz,* 435 U.S. 78 (1978), that "a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'" *Id.* at 91 (citations omitted). Moreover, this Court appears to have tacitly approved of judicial review in such circumstances by having itself conducted a review in *Horowitz* sufficient to conclude that "no showing of arbitrariness or capriciousness has been made in this case." *Id.* at 92 (footnote omitted). Indeed, while most courts have interpreted this Court's comments as permitting substantive review under the arbitrary and capricious standard, no court has viewed *Horowitz* as precluding such a cause of action.[9] *See, e.g., Stol'er v. College of Medicine,* 562 F.

---

[9]The Regents have argued in their petition, for the first time in this litigation, that "[s]ome courts have held that this Court's admonition in *Horowitz* forecloses substantive judicial review altogether." Petition at 16. Cited in support are *Lavash v. Kountze,* 473 F. Supp. 868 (D. Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979) and *Hubbard v. John Tyler Community College,* 455 F. Supp. 753 (E.D. Va. 1978). Neither of these cases, however, held that *Horowitz* precludes such a review. *Lavash* is solely

(Continued on following page)

Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984); *Hines v. Rinker,* 667 F.2d 699, 703 (8th Cir. 1981); *Stevens v. Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981); *Nuttelman v. Case Western Reserve University,* 560 F. Supp. 1, 3 (N.D. Ohio 1981), *aff'd* 708 F.2d 726 (6th Cir. 1982); *Crook v. Baker,* 584 F. Supp. 1531, 1562 (E.D. Mich 1984). Even the District Court here noted,

> Other post-*Horowitz* decisions have either tacitly or expressly concluded that *Horowitz* does allow such substantive review. *Dietz v. American Dental Ass'n,* 479 F.Supp. 554 (E.D. Mich. 1978); *Aubuchon v. Olsen,* 467 F.Supp. 568 (E.D. Mo. 1979); *Watson v. University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979); *Bleicker v. Board of Trustees of the Ohio State University, College of Veterinary Medicine,* 485 F.Supp. 1381 (S.D. Ohio 1980). A recent Fifth Circuit decision not only allowed such review, but found that the academic decision in question was arbitrary and capricious in that it required students to be tested on materials which they had not been adequately taught. *Debra P. v. Turlington,* 644 F.2d 397 (5th Cir. 1981).

App. 22a (footnote omitted).

(Continued from previous page)

a procedural due process case. 473 F. Supp. at 872. In *Lavash* the First Circuit noted that "[t]he Supreme Court in *Board of Curators, Univ. of Mo. v. Horowitz,* [citations omitted], held that, *absent arbitrariness or capriciousness,* dismissals for academic reasons do not necessitate a due process hearing." 604 F.2d at 106 (emphasis added). In *Hubbard,* a district court concluded that this Court's comments in *Horowitz* left unanswered the extent to which substantive due process review is permitted. 455 F. Supp. at 755 ("The Supreme Court, thus, did not directly pass on the validity of implications of lower court 'dictum' on substantive due process"). Finally, the defendant school in *Hubbard* was found to have acted properly because it had followed its own rules and was "only asking of plaintiff what it asks of all nursing students." 455 F. Supp. at 756.

The District Court also observed that, while *Horowitz* "demonstrates the continuing vitality of this hands-off approach in warning against judicial intrusions into such areas," App. 23a (citation omitted),

> [t]his is not to say that decisions as to academic qualification are not subject to substantive due process review. Throughout this century this constitutional requirement has constantly been interpreted as requiring both procedural and substantive compliance. *Kelley v. Johnson,* 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976). So long as protected interests (life, liberty or property) are implicated, the Constitution mandates that due process, including all of its component parts, be accorded.

App. 24a. Similarly, Regents, too, have acknowledged that an arbitrary and capricious dismissal is potentially actionable. Defendant-Appellee's Brief at 14, 17.

If this sort of limited substantive review of a student's dismissal were not permitted, a university could not only treat similarly situated students differently and disregard without notice the very rules it itself once promulgated for sound educational reasons, but it could also, for example, retroactively increase the number of credits required for graduation or even rescind a former student's degree absent just cause. Indeed, as improbable as the rescission of a degree might seem, this is precisely what Regents attempted in another recent case. *Crook v. Baker,* 584 F. Supp. 1531 (E.D. Mich. 1984). In that case, Regents endeavored to rescind a former student's master's degree. The district court there held, with respect to the substantive due process claim:

> It is clear . . . that plaintiff was deprived of his constitutionally protected property and liberty interests by the actions of the defendants. The only ques-

> tion is whether that deprivation was arbitrary and capricious. The court concludes, as a matter of law, that it was. . . .

Id. at 1562.

Under Michigan law, Ewing had a property interest in not being arbitrarily dismissed. *See Booker v. Grand Rapids Medical College,* 156 Mich. 95, 120 N.W. 589 (1909), (discussed by Court of Appeals (App. 30a-31a)). It should be emphasized that Ewing has in no way sought to enlarge the judiciary's limited presence in the academic community and has only sought protection of his state-recognized property interest. As has been repeatedly stressed throughout this litigation,

> Ewing does not challenge the Board's [Regents'] authority to establish the criteria for training or evaluating medical students; rather, Ewing vigorously challenges the Board's right to disregard its own preset rules and criteria in order to deny one student, Ewing, what every other similarly situated student has received—an opportunity to retake the NBME Part I.

Plaintiff-Appellant's Reply Brief at 2. Thus, Ewing has no quarrel with Regents' position that decisions as to academic qualifications are matters peculiarly within the faculty's competence. It is not for courts of law to second-guess a student's grades or test scores. However, this principle does not bar courts from considering whether a school has breached its contractual relations with its students, has violated its own published rules and established practices or has otherwise deprived a student of a property interest by its arbitrary and capricious conduct. As the Eighth Circuit observed in *Greenhill v. Bailey,* 519 F.2d 5 (8th Cir. 1975),

> It is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students. [Citations omitted.] Notwithstanding this customary "hands-off" policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property.

Id. at 7 (citations omitted).

This Court, too, has recognized that there is no compelling reason to place school officials beyond the law's reach. Although specifically directed at the qualified good-faith immunity of school officials from liability for damages under Section 1983, the Court's comments in *Wood v. Strickland,* 420 U.S. 308 (1975), are broadly applicable to the instant case. In *Wood,* this Court observed that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320. For the same reason, a student who may have been arbitrarily and capriciously dismissed is entitled to at least some substantive due process review by a court of law. In such cases, the burden of proof is at all times on the student.

Moreover, as the extremely small number of successful student plaintiffs convincingly attests, the arbitrary and capricious standard is an appropriately difficult one to meet. As a result, no conscientious school official should ever feel threatened by this review. Indeed, the commu-

nity of medical educators at large seems well aware that, its broad discretionary authority in academic matters notwithstanding, it cannot act arbitrarily with impunity. *See*, e.g., Irby, Fantel, Milam and Schwarz, *Special Report: Legal Guidelines for Evaluating and Dismissing Medical Students,* 304 New England Journal Of Medicine 180, 182 (1981) ("[A]rbitrary and capricious steps by the faculty are actionable, but the burden of proof is on the student"). It is "only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student." *Connelly v. University of Vermont and State Agr. Col.,* 244 F. Supp. 156, 160 (D. Vt. 1965). *See also Gasper v. Bruton,* 513 F. 2d 843, 850 (10th Cir. 1975) ("Courts have historically refrained from interfering with the authority vested in school officials to drop a student . . . absent a clear showing that the officials acted arbitrarily or have abused the discretionary authority vested in them").

The above discussion makes it clear that it would not have been proper for the lower courts to review Ewing's academic record to determine whether he was qualified to sit for the NBME Part I in the first instance.[10] Nor would it have been proper for the courts to review the appropriateness of the University's NBME retest rule, which provided that "[s]hould a [qualified] student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." PX 3

---

[10]Ironically, though the District Court explicitly warned against a review of this sort in its opinion, App. 24a-25a, it nevertheless failed to heed its own admonition. In doing so the District Court even found "deficiencies" where the medical faculty found none. Tr. I at 201-02; Tr. II at 90-91, 102, 106-07.

at 30. The medical faculty alone possessed the expertise for these determinations. However, the law does not permit Regents, with impunity, to retroactively and unilaterally alter the rules which they themselves previously established. Regents set the rules, as they were empowered to do: but having set the rules, Regents must live by them, too.

Once it is acknowledged that universities are not above the law and that a dismissed medical student is entitled to at least a limited substantive due process review to safeguard against arbitrary and capricious dismissal, the only issue remaining is whether the facts here support a finding of arbitrariness and capriciousness. In this regard, the Sixth Circuit was unequivocal: "The evidence plainly demonstrates that the University treated Ewing in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME." App. 33a. In support of its conclusion, the Court of Appeals noted, among other things, that there is

> substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it. Joint Appendix at 157-58. In fact, the evidence is undisputed that between 1975 and 1982, of the forty medical students who failed the NBME Part I on the first attempt, every one of these students was allowed a reexamination except Ewing. Joint Appendix at 110-11.

App. 32a.

In view of this Court's traditional and proper reluctance to accept for review cases involving little more than disputed facts, it must be noted that much of Regents' argument in support of granting the writ relies on

just such matters. For example, Regents contend that Ewing was on "strict academic probation" when he took the NBME Part I. Petition at 5. This contention, however, is not new but was in fact emphasized by Regents in their argument before the Court of Appeals. Defendant-Appellee's Brief at 23-24. Yet the Sixth Circuit was not persuaded, and rightly so, since the evidence strongly suggests that if Ewing ever had been on probation, he was removed from it in advance of the examination date. Tr. I at 173-75; Tr. III at 253-54, 287-89; PX 9.

Finally, Regents' assertion that the Court of Appeals has usurped their authority by proclaiming Ewing a qualified student is erroneous. As the Court of Appeals observed, it was actually Regents themselves who made this determination:

> There is substantial evidence in the record, and there is no district court finding to the contrary, that Ewing was a "qualified" student, *as the University defined that term,* at the time he sat for the NBME Part I. Joint Appendix at 298, 299.

App. 33a (emphasis added). The reference by the Court of Appeals to the Joint Appendix contains the following exchange between Ewing's counsel and Dean Reed, director of the Inteflex Program during the entire period of Ewing's enrollment and chairman of the Promotion and Review Board[11]:

---

[11]As chairman, Dean Reed was the only person empowered to speak for the Review Board as a whole. See the testimony of Promotion and Review Board member Dr. Friedman: "The only person who speaks for the Promotion Board is Dr. Reed." Tr. III at 289.

Q. (By Mr. Conway): Am I correct, then, Mr. Ewing had no outstanding deficiency when he took the NBME Part I?

A. That's correct.

Q. Was Mr. Ewing a qualified medical student at the time he took the NBME Part I?

A. Yes; he was in good standing, at that time.

Q. You were asked, by Mr. Davis [Regents' counsel], about Plaintiff's Exhibit 3 [the University publication "On Becoming a Doctor"]; do you recall this booklet?

A. Yes.

Q. Do you recall the quote of Dr. Gibson [at p. 30 on "On Becoming a Doctor"] with respect [to] "every qualified medical student" being given an opportunity to make up a failure [of the NBME Part I] in a second exam?

A. Yes.

Q. And at the time Mr. Ewing took the exam, he was a qualified medical student, was he not?

A. At the time he entered the examination, yes.

Tr. II at 104-05. Other, equally explicit testimony confirmed that Ewing was considered, by Regents themselves, a "qualified" student and thus entitled to the benefits of the University's retest rule. Tr. III at 181-82, 147.

———o———

CONCLUSION

For the foregoing reasons, Ewing respectfully requests that the writ be denied.

Respectfully submitted,

MICHAEL M. CONWAY*
MARY K. BUTLER
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

Attorneys for Respondent

*Counsel of Record